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TAN TIEN SENG & ANOR

v.

GROBINA RESORTS SDN BHD

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HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[COMPANIES (WINDING-UP) NO: MT1-28-1-2006]
18 AUGUST 2006

C ***COMPANY LAW:*** *Winding-up - Petition - Judgment debt - Whether judgment debt disputed - Whether statutory notice sine qua non to petition - Whether judgment debtor solvent - Companies Act 1965, s. 218(1)(e)*

D ***COMPANY LAW:*** *Winding-up - Opposition to petition on judgment debt - Company opposing petition - Whether had the requisite locus standi - Whether a contributory within s. 4(1) Companies Act 1965*

This was the judgment creditors ('JCs') petition to wind up the judgment debtor company ('JD') under s. 218(1)(e) of the
E Companies Act 1965. The issues were: (1) whether one Yakin Mulia (M) Sdn Bhd ('Yakin Mulia') had the *locus standi* to oppose the petition as a contributory; (2) whether the judgment debt was disputed; (3) whether the statutory notice was defective; and (4) whether the JD had the ability to pay the
F judgment debt.

Held (allowing the petition):

(1) The tenor of s. 4(1) of the Companies Act 1965 is clear
G and unambiguous in that a contributory means a person liable to contribute to the assets of the respondent company and such a person is extended to include holders of fully paid shares. In addition, their names must also be entered in the register of members. Yakin Mulia did not
H appear to come within any of the illustrations given herein and therefore was not a contributory within s. 4(1) of the said Act. In the circumstances, Yakin Mulia had no *locus standi* to appear and oppose the petition. (para 20)

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(2) The facts showed that there was no legal impediment to the judgment creditors obtaining the fruits of their litigation. (paras 24, 25, 26 & 27)

(3) The issuance of the statutory notice is not a *sine qua non* to the petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due. As the statutory notice is not a prerequisite to the petition, there was no merit in the submission raised that the statutory notice was defective. (paras 30, 31, 32 & 33)

(4) The JD's claim that it had several unnamed and unidentified housing projects was unsubstantiated and therefore the presumption of insolvency against it was not rebutted. (para 40)

Case(s) referred to:

Bank Utama (M) Bhd v. GKM Amal Bhd [2000] 2 CLJ 525 HC ***(refd)***

Cornhill Insurance plc v. Improvement Services Ltd & Ors [1986] 1 WLR 114 ***(refd)***

Europlus Corporation Sdn Bhd v. Lim Wai Leng [2003] MLJU 42 ***(refd)***

In the matter of Simionato Holdings Pty Ltd; The Commissioner of Taxation of the Commonwealth of Australia v. Simionato Holdings Pty Ltd [1997] Aust Fedct Lexis 55 ***(refd)***

Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 2 MLJ 53 ***(refd)***

Meram Holdings Sdn Bhd v. GKM Wilayah-Prescon Sdn Bhd [2005] MLJU 352 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(refd)***

Pilecon Engineering Bhd v. Remaja Jaya Sdn Bhd [1997] 1 MLJ 808 HC ***(refd)***

Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver and Liquidator of Mosbert Acceptance Ltd [1978] 1 MLJ 57 ***(refd)***

RHB Bank Berhad v. Pembinaan MCP Sdn Bhd [2002] 597 MLJU 1 ***(refd)***

SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd [2002] 2 CLJ 329 HC ***(refd)***

Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd (Poly Glass Fibre (M) Bhd, Applicant) [2002] 4 CLJ 589 HC ***(refd)***

Taylors Industrial Flooring Ltd v. M & H Plant Hire (Manchester) Ltd [1990] BCLC 216 CA ***(refd)***

Teck Yow Bros Hand-Bag Trading Company v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 HC ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218(1)(e), 4(1), 243(1), 244(1), 252(b)
Companies (Winding-up) Rules 1972, rr. 67, 68, 69, 70, Form 8

Other source(s) referred to:
Andrew R Keay, McPherson, *The Law of Company Liquidation*, 1999, 4th edn, pp 401, 402
Arjunan & Low, *Lipton & Herzberg's Understanding of Company Law in Malaysia,* 1995, p 434
Buckley, *Companies Act*, 13th edn, p 460
Loh Siew Cheang, *Corporate Powers, Controls, Remedies and Decision Making*, 1996, p 676
Walter Woon, *Company Law,* 2nd edn, pp 721, 722

For the judgment debtor - FH D'Cruz (BP Yap with him); M/s Bell & Lee
For the judgment creditor - Claudia Cheah Pek Yee; M/s Skrine

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Petition

[1] Before me is the judgment creditors' petition in encl. (3) for an order that the respondent ("judgment debtor") be wound up under s. 218(1)(e) of the Companies Act 1965 ("the petition") with consequential orders for the appointment of the director general of the Insolvency Department as the judgment debtor's provisional liquidator, and costs.

[2] Unless the context otherwise requires or unless otherwise stated, a reference hereinafter to a section is a reference to that section in the Companies Act 1965.

Factual Background

[3] The uncontroverted facts are simple and straightforward.

[4] *Vide* Melaka High Court Civil Suit No. 24-537-2000 ("the civil suit"), the judgment creditors had on 14 July 2005 obtained judgment which together with all accrued interest amounted to RM1,236,246.72 as at 3 October 2005 ("the judgment debt"). A

[5] Despite requests and demands made by the judgment creditors to the judgment debtor to settle the judgment debt, the judgment debtor has failed to pay the same or any part thereof. B

[6] On 10 October 2005, the judgment creditors through their solicitors served a notice of demand under s. 218 ("the statutory notice") on the judgment debtor by leaving the same at the registered office, calling upon the judgment debtor to make payment of the judgment debt and further interest within three weeks of the receipt of the statutory notice, but the judgment debtor has failed to do so. C D

[7] On 15 June 2006, one Yakin Mulia (M) Sdn Bhd ("Yakin Mulia") claimed to be a contributory of the judgment debtor and opposed the petition. E

[8] It now becomes necessary for me to determine the preliminary issue pertaining to Yakin Mulia's *locus standi* as an alleged contributory.

Locus Standi And "Contributory" F

[9] It was submitted by learned counsel Ms Claudia Cheah Pek Yee for the judgment creditors that Yakin Mulia had no *locus standi* to appear and oppose this petition as it is not a contributory of the judgment debtor, citing: G

(1) s. 4(1);

(2) Form 8, Companies (Winding-up) Rules 1972;

(3) Arjunan & Low, *Lipton & Herzberg's Understanding of Company Law in Malaysia,* 1995 p. 434; H

(4) Walter Woon, *Company Law* 2nd edn, pp. 721 and 722; and

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A (5) Andrew R Keay, McPherson, *The Law of Company Liquidation* 4th edn, 1999 pp. 401 and 402.

[10] Yakin Mulia's learned counsel Mr. CK Ng in contending that Yakin Mulia is a contributory under s. 4(1) relied on a B mutual benefit agreement ("the agreement") executed between Yakin Mulia and one Kamra Jaya Sdn Bhd ("Kamra Jaya") wherein Yakin Mulia was to pay the judgment debtor RM50,000 as management expenses due from Kamra Jaya to the judgment debtor as the management company for Yakin C Mulia's housing projects and Yakin Mulia has to pay a monthly sum of RM15,000 to the judgment debtor with effect from 1 January 2005 as administration costs.

[11] Support was sought in:

D (1) *Vijayalakshmi Devi d/o Nadchatiram v. Dr Mahadevan s/o Nadchatiram & Ors* [1995] 3 CLJ 493 FC;

(2) *Pilecon Engineering Bhd v. Remaja Jaya Sdn Bhd* [1997] 1 MLJ 808 HC; and

E (3) *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd (Poly Glass Fibre (M) Bhd, applicant)* [2002] 4 CLJ 589 HC.

[12] In considering the word "contributory" in relation to a company, I am mindful of its definition in s. 4(1) ie, a person F liable to contribute to the assets of the company in the event of its being wound up and includes the holder of fully paid shares in the company and, prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory.

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[13] In this regard, with the utmost respect, upon reading *Vijayalakshmi Devi*, *supra*, cited for Yakin Mulia, I find that the judgment delivered by Mohamed Dzaiddin FCJ (later CJ Malaysia) is of no relevance to the issue raised for Yakin Mulia.

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[14] The same can be said of the judgment of Kamalanathan Ratnam JC (later J) in *Pilecon Engineering*, *supra*, which clearly does not concern any issue of contributory.

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[15] In *Sri Binaraya Sdn Bhd, supra*, an application was filed by an applicant seeking leave pursuant to s. 243 to stay all proceedings in relation to the winding up order. The petitioning creditor objected to the applicant's application. The applicant held all the issued and paid up share capital of the respondent company. The relevant issue for determination was whether the applicant was a contributory for the purpose of s. 243(1) read together with s. 4(1). Section 243(1) where relevant reads:

> 243 Power to stay winding up
>
> (1) At any time after an order for winding up has been made the Court may, on the application of the ... contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[16] Having regard to s. 243(1) and s. 4(1), Zulkifli J (now JCA) gave the answer in the affirmative.

[17] It is to be noted that Yakin Mulia before me had never held any share capital in the respondent company. Hence, I am unable to see how *Sri Binaraya*, *supra*, could be of any assistance to Yakin Mulia.

[18] Apparently, it was also submitted that Yakin Mulia was "a person alleged to be a contributory" as included in the third limb of the definition in s. 4(1).

[19] At this juncture, it is appropriate for me to give a comprehensive treatment to the ambit and purview of s. 4(1).

[20] The tenor of s. 4(1) is clear and unambiguous in that a contributory means a person liable to contribute to the assets of the respondent company and such a person is extended to include holders of fully paid shares. In addition, their names must also be entered in the register of members: see Arujnan & Low, Lipton & Herzberg's *Understanding Company Law in Malaysia*, *supra*, at p. 434; Walter Woon, *Company Law* 2nd edn, pp. 721 and 722; and Andrew R Keay, McPherson, *The Law of Company Liquidation* 4th edn, pp. 401 and 402.

[21] At p. 676 of Loh Siew Cheang's *Corporate Powers, Controls, Remedies and Decision Making*, 1996, the learned author observed :

> (1) the word "contributory" is used in two senses *viz*:
>
> (a) to characterize the category of persons who have *locus standi* as contributory under s. 217(1)(c) to file a winding up petition; and
>
> (b) to denote the category of persons who do not fall within s. 217(1)(c) but who are nevertheless persons liable to contribute in the event of the company being wound up or when winding up supervenes (see also *Rehlbolton Engineering Co Ltd* [1956] 1 Ch. 57 per Wynn-Parry J).

[22] At p. 677, *ibid*, the learned author added that the other category includes persons who are caught under the third limb of the definition, namely "prior to the determination of the persons who are contributories, includes every person alleged to be a contributory", and that the meaning of these words are to be gathered from a reading of the Act and the winding up rules as a whole. The Act empowers the court and the liquidator respectively to settle the list of contributories and this power arises upon a winding up order being made (s. 244(1) and s. 252(b) respectively). Under the Companies (Winding up) Rules 1972, the liquidator is under a duty to (a) draw up an interim list setting out the names of persons whom he proposes to include in the list of contributories; (b) send out the proposed list to the affected persons and fix a date for hearing objections; and (c) decide upon the objections, if any, and settle the final list and inform the persons whose names appear in the final list that they may make an application to the court to vary the list (Rules 67-70 Companies (Winding up) Rules 1972). Where a person objects to being named as a contributory on the final list of contributories drawn up by the liquidator, he is still regarded as a contributory for the purposes of liability to pay money or make good calls prior to the court's determination on his objection.

[23] I agree with and apply the above statements expounded by the respective learned authors and find that Yakin Mulia does not appear to come within any of the illustrations given by them. I therefore hold that Yakin Mulia is not a "contributory" within the meaning of s. 4(1), and so has no *locus standi* to appear and oppose this petition.

Judgment Debt

[24] In resisting the petition, learned counsel Mr. FH D'Cruz, assisted by Mr. BP Yap, contended for the judgment debtor that there is an appeal against the judgment debt.

[25] It was submitted for the judgment creditors that upon the judgment being entered, the debt ceased to be disputed.

[26] It is necessary for me to categorically state that the judgment creditors had obtained judgment after a full trial. Subsequently, upon the judgment debtor's application, I granted a conditional stay thereof, the condition being that the judgment debtor was to pay the judgment debt into the solicitors' joint account within 21 days of the conditional stay and that such debt was not to be released pending the disposal of the judgment debtor's appeal. However, the judgment debtor had declined to fulfil the condition, thereby deliberately allowing the conditional stay to lapse.

[27] The judgment debtor had instead filed another application in the Court of Appeal in order to seek a second bite at the proverbial cherry. The Court of Appeal had without any hesitation dismissed the judgment debtor's second application. There is therefore no stay and hence no legal impediment to the judgment creditors obtaining the fruits of their litigation. Hence, this winding up petition.

[28] It is instructive to note that even a default judgment is a good and enforceable judgement to form the basis for supporting a winding up petition: per Hashim Yeop A Sani CJ (M) (as he then was) in *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343; so also a summary judgment: per Abdul Aziz J (now FCJ) in *Bank Utama (M) Bhd v. GKM Amal Bhd* [2000] 2 CLJ 525; and per Su Geok Yiam JC (now J) in *SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd* [2002] 2 CLJ 329 HC.

A **Defective Statutory Notice**

[29] The judgment debtor raised the issue that the judgment creditors' statutory notice was defective while the judgment creditors held a contrary view.

B **[30]** I shall first consider the question as to whether the issuance of the statutory notice is a *sine qua non* to the petition.

[31] In *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd and Other Appeals* [2001] 3 CLJ 248 CA, Gopal Sri C Ram JCA gave the answer in the negative, adding that what is needed is compelling evidence of the company's inability to pay its debts as and when they fall due.

[32] A similar answer was given by Abu Mansor J (later FCJ) D in *Teck Yow Bros Hand-Bag Trading Company v. Maharani Supermarket Sdn Bhd* [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 HC; and Dillon LJ in *Taylors Industrial Flooring Ltd v. M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216 CA.

E **[33]** In the circumstances, it is trite law that the statutory notice is not a prerequisite to the petition and so the alleged ground of a defective statutory notice is the judgment debtor's red herring. Further, I am unable to see any merit in this submission, as there is no defect therein.

F **Inability To Pay**

[34] It was said for the judgment debtor that it has several on-going housing projects and so it is not insolvent.

G **[35]** In submitting on the judgment debtor's inability to pay and insolvency, the judgment creditors relied on the the judgment debtor's non-compliance with the statutory notice, and its failure to lodge accounts for five years, commencing 31 December 2001.

H **[36]** In my view, as the judgment debtor has failed to comply with the statutory demand and to pay the judgment debt, it is presumed to be unable to pay its debt ie, it is insolvent (see my judgment in *RHB Bank Berhad v. Pembinaan M.C.P. Sdn Bhd* [2002] 597 MLJU 1 at p. 3; and *Taylors Industrial Flooring* I *Ltd*, *supra*, per Dillon LJ.).

[37] The burden is on the judgment debtor to prove its solvency. It is imperative to observe that, in contravention of the Companies Act 1965, the judgment debtor has for five years ie, since 31 December 2001 failed to lodge updated accounts with the Companies Commission of Malaysia (formerly the Registry of Companies). The judgment debtor has never produced or exhibited its accounts to overcome this vacuum. It is abundantly clear that the judgment debtor is neither solvent nor active, as has been highlighted in two authorities.

[38] First, in *Meram Holdings Sdn Bhd v. GKM Wilayah-Prescon Sdn Bhd* [2005] MLJU 352, there was a s. 218 petition for the respondent to be wound up on ground of its inability to pay. The relevant facts revealed that the respondent had not filed its audited accounts for seven years and that there was no evidence that it was actually able to pay its debts or is commercially solvent. Hence Abdul Wahab bin Said Ahmad J concluded that it would be against public interest to allow an insolvent company to continue trading when it does not have the ability to settle its debts.

[39] The next case is *In the matter of Simionato Holdings Pty Ltd; The Commissioner of Taxation of the Commonwealth of Australia v. Simionato Holdings Pty Ltd* [1997] Aust Fedct Lexis 55, which concerns a petition for the winding up of the respondent on the basis of an equipollent provision of the Malaysian s. 218. The respondent, a trust company, had presented no detailed balance sheets or profit and loss accounts or trading statements for several years. Its annual returns disclosed total assets of a mere A$100, and there was no operating profit or loss for that financial year. Mansfield J could find no reason why he should not make a winding up order against the respondent.

[40] Reverting to the judgment debtor's claim that it has several unnamed and unidentified housing projects elsewhere, it is my view that such unsubstantiated claim does not *ipso facto* rebut the presumption of insolvency against it.

[41] Support for my view may be garnered from *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 where the Privy Council upheld the concurrent winding up order made by the Singapore Court of Appeal and High Court in which Wee Chong Jin CJ (Singapore) (as he then was) cited a passage from Buckley on the *Companies Act*, 13th edn, at p. 460, dealing with commercial insolvency, as meaning that the company was unable to meet current demands upon it, and referred to the following impeccable passage:

> In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

[42] Further support is to be found in *Re Sunshine Securities (Pte) Ltd.; Sunshine Securities (Pte) Ltd. & Anor. v. Official Receiver and Liquidator of Mosbert Acceptance Ltd.* [1978] 1 MLJ 57 where the Singapore Court of Appeal in a judgment delivered by Rajah J rejected the respondent's submission that the respondent owned a property which was worth far in excess of the alleged debt due to the petitioner seeking to wind up the respondent under s. 218, and referred to the law clearly stated in the above passage from Buckley on the Companies Act.

[43] In the instant petition, although the respondent, by mere lip service, claims to be able to pay the judgment debt, it is in reality embarking on a persistent and deliberate refusal to pay. In my view, the respondent's bare claim coupled with the absence of satisfying the judgment debt cannot provide the respondent with any defence: *Cornhill Insurance plc v. Improvement Services Ltd and Others* [1986] 1 WLR 114, as applied by Abdul Malik Ishak J in *Europlus Corporation Sdn Bhd v. Lim Wai Leng* [2003] MLJU 42.

Conclusion

[44] On the foregoing grounds, the inevitable result is the making of a winding up order against the judgment debtor which I hereby do, in terms of the petition in encl (3).